

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT SHAEFFER, Personal Representative of  
the Estate of MARY E. SHAEFFER,

UNPUBLISHED  
May 15, 2007

Plaintiff-Appellee,

v

MARY BURGHARDT,

No. 267717  
Macomb Probate Court  
LC No. 04-182077-CZ

Defendant-Appellant.

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Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff entered following a jury trial. We affirm in part, vacate in part and remand for further proceedings.

**I. Factual Background**

This case arises out of a will contest regarding the estate of the decedent, Mary E. Shaeffer. The decedent died on March 20, 2004, leaving five adult children as her beneficiaries: Eugene Shaeffer, Patricia Marchese, Ronald Shaeffer, Robert Shaeffer, and defendant, Mary Burghardt. In 1986, the decedent's husband, Ted Shaeffer, predeceased her. The decedent attained only a 4<sup>th</sup> grade education and completely relied on her husband for financial decisions and management. Following his death, the decedent's children assumed various responsibilities to help the decedent, with defendant assisting her by writing out checks for payment of her monthly bills and expenses.

The decedent had obtained the services of an attorney and former judge, Martin Smith, to draft testamentary documents for her in 1986, 1989 and in 2003. All the wills were substantially similar, containing directives for payment of final expenses, dispensation of items of personalty to various family members and a residuary clause for the division of remaining probate assets equally among the decedent's beneficiaries. Less than a month before execution of the January 2003 will, the decedent signed an application for membership and share account agreement, containing a beneficiary option, for her accounts with the Knights of Columbus credit union,

naming herself and defendant as co-owners of the accounts.<sup>1</sup> These accounts had a balance of approximately \$192,902.08 as of March 2004. The decedent's other assets included: (a) her condominium, which was transferred outside the estate by an escrowed deed in equal shares to her five beneficiaries and sold for \$174,275; (b) a certificate of deposit with Standard Federal bank valued at approximately \$41,080, which was divided equally among the decedent's beneficiaries; (c) a Keystone Annuity valued at \$22,745.70, which named defendant as the primary beneficiary; and (d) a Ford Life annuity, worth \$28,612, which named defendant as the primary beneficiary.<sup>2</sup>

Following the decedent's death a dispute arose regarding distribution of the Knights of Columbus accounts and the two annuities. Defendant asserted that the decedent and defendant's father told her that she was to be the sole beneficiary of these accounts to assist her with her retirement. Defendant denied that the decedent had limited her use of the accounts or that she had been instructed to distribute the accounts or annuities amongst all of the beneficiaries. The remaining beneficiaries of decedent's estate asserted the decedent had verbally informed them that all of her assets were to be divided equally amongst them. Decedent's estate initiated both a will contest and this civil action alleging undue influence, fraud and deceit, breach of fiduciary duty, incapacity, constructive trust and conversion. The jury denied most of plaintiff's claims except for finding against defendant on silent fraud based on a determination that defendant failed to disclose to the decedent that her will did not control the disposition of jointly owned assets, such as the annuities and Knights of Columbus accounts. The jury also found against defendant on plaintiff's claims of breach of fiduciary duty and conversion, determining defendant had improperly signed the decedent's name to checks negotiated from the accounts on which defendant was a joint owner with the decedent for defendant's personal use and benefit.

Notably, on the special verdict form, the jury indicated that the decedent "intend[ed] the accounts to become the property of the survivor" and had "the mental capacity" to understand "[w]hen the survivor's name was added to the accounts . . . that the account would become the property of the survivor." However, the jury, on the same verdict form, determined that defendant "fail[ed] to disclose material facts about Decedent's . . . Will not controlling assets owned jointly with defendant or to insurance policies or annuities when Defendant was named primary beneficiary." In addition, the jury determined that this failure to disclose "cause[d] decedent to have a false impression" and that defendant had "a duty to disclose to [sic] that she was a joint account holder with Mary Shaeffer and named beneficiary on Decedent's insurance policies and annuities."

Defendant brought a motion for directed verdict. Subsequently, defendant also filed a motion for new trial, remittitur or judgment notwithstanding the verdict. The trial court denied both motions and this appeal ensued.

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<sup>1</sup> The lower court record contains evidence that similar bank cards for ownership of the accounts were executed by decedent in 1986 and 1989.

<sup>2</sup> Decedent's son, Robert Shaeffer, was named as the alternate beneficiary on the annuities.

## II. Standard of Review

Defendant first asserts that a directed verdict should have been granted in her favor concerning the claims of silent fraud, conversion, and breach of fiduciary duty. A trial court's decision on a motion for a directed verdict is reviewed de novo to determine whether the evidence and all legitimate inferences from the evidence, when viewed in the light most favorable to the nonmovant, fail to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

## III. Analysis

At trial plaintiff contended that defendant breached her affirmative duty to disclose to the decedent that making defendant a joint owner of the credit union accounts, along with naming defendant as the beneficiary of life insurance policies and annuities, would preclude the inclusion of these assets in decedent's estate. Plaintiff asserted that defendant purposefully remained silent resulting in the decedent's false impression that the residuary clause of her will would supersede and direct distribution of these assets in equal portions to all of her beneficiaries. As raised in her motion for directed verdict, defendant first contends that the claim of silent fraud should not have been submitted to the jury because it was insufficiently pleaded in plaintiff's complaint.

It is undisputed that a claim of silent fraud was not specifically pleaded in plaintiff's complaint. However, in denying defendant's motion for a directed verdict on the issue of silent fraud, the trial court ruled, "I have reviewed the complaint, I do believe that the issue of silent fraud was implied in the pleadings in the complaint, I think that is appropriate." Contrary to the trial court's ruling, a complaint is required to contain a statement of facts and allegations sufficiently specific to reasonably inform an adverse party of the nature of claims asserted. MCR 2.111(B)(1); *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998). In addition, the circumstances constituting fraud or mistake must be stated "with particularity." MCR 2.112(B)(1). Plaintiff's complaint lacks any allegation that defendant's silence resulted in misrepresentations to the decedent. Rather, plaintiff merely alleges that defendant falsely represented to the decedent that, despite having made defendant a primary beneficiary on certain accounts and policies, defendant would distribute the proceeds in equal shares to all beneficiaries in accordance with the decedent's alleged preferences. Plaintiff did not allege within the complaint with any particularity the circumstances in which these representations were made.

"[A] claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure." *M & D, Inc v McConkey*, 231 Mich App 22, 36; 585 NW2d 33 (1998). Mere nondisclosure is insufficient. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000); *Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). "A legal duty to disclose commonly arises from a circumstance in which the plaintiff inquires regarding something, to which the defendant makes a false or misleading representation by replying incompletely with answers that are truthful but omit material information." *Id.* at 500. In this instance, plaintiff has merely pleaded common-law fraud, contending only that defendant affirmatively told the decedent that she would distribute the proceeds of specified accounts in equal amounts to all beneficiaries despite her listing as a joint owner or beneficiary. This contains no allegation pertaining to the decedent's will or false representations by defendant regarding the effect, or lack of effect, of the will on the joint ownership or beneficiary

designation on these accounts. In the alternative, plaintiff has asserted merely nondisclosure, but has not established a question of fact with regard to whether defendant made incomplete representations and, thus, committed silent fraud. Plaintiff has not pleaded that the decedent inquired about the impact of the will on the jointly owned accounts or beneficiary designations only to have defendant provide a false or misleading representation. Because plaintiff's complaint only alleges that defendant made an affirmative misrepresentation, not a nondisclosure of material information, plaintiff has failed to state a claim of silent fraud. Hence, the trial court erred in permitting this issue to proceed to the jury.

In addition, because the complaint did not include a specified claim of silent fraud, the trial court erred in effectively sua sponte amending plaintiff's complaint to add this as an additional claim and permitting the issue to be presented to the jury. MCR 2.118 permits the amendment of pleadings to conform to the evidence. Specifically, MCR 2.118(C)(1) states:

When issues not raised by the pleadings are tried by express or implied consent of the parties they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In this case, defendant did not consent to amendment of the pleadings to include a claim of silent fraud, as demonstrated by the inclusion of an argument within defendant's motion for directed verdict seeking preclusion of such a claim due to the failure of plaintiff to plead this issue. "While issues not raised in the pleadings may be decided if the parties consent . . . here [defendant] specifically did not consent to the inclusion of the claims," thus "we must conclude that the court's judgment exceeded the scope of the case." *Bronson v American States Ins*, 215 Mich App 612, 619; 546 NW2d 702 (1996) (citation omitted).

Defendant next contends insufficient evidence existed to permit the jury to determine that defendant improperly converted funds from the accounts maintained with the decedent as a joint owner. The issue of conversion is two-fold. Plaintiff first asserts defendant improperly converted funds from the decedent's Knights of Columbus accounts by using funds for her personal benefit during the decedent's lifetime. The amount of checks allegedly improperly negotiated by defendant during the decedent's lifetime equaled approximately \$34,424.

"In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992) (footnote omitted). "To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Because the holder of a joint account may withdraw the entire account, *Dep't of Treas v Comerica Bank*, 201 Mich App 318, 325; 506 NW2d 283 (1993), an action for conversion requires the defendant to have obtained money without the owner's consent and includes an obligation to return the money entrusted to the defendant's care, *Citizens Ins Co v Delcamp Truck Ctr, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989).

We would agree with the jury's determination that, during her lifetime, the decedent intended to retain control of her bank accounts. Sufficient evidence was presented that defendant

signed the decedent's name on checks and negotiated checks written by defendant to herself or members of her family for her own benefit for submission of the claim of conversion of these accounts during the decedent's lifetime to the jury. Notably, the decedent retained control of the checkbooks and bank statements during her lifetime. The decedent directed defendant regarding which checks to write or what bills to pay from the accounts. Defendant testified that monies removed by her were either repaid or intended for repayment. Such behavior is not indicative of joint ownership. Hence, testimony demonstrated that inclusion of defendant on these accounts was for the purpose of permitting defendant to assist the decedent in maintaining her financial obligations. However, defendant withdrew money from the accounts and used it for her own purposes. Accordingly, we would affirm the portion of the judgment requiring defendant to turn over to plaintiff the funds withdrawn from the jointly held bank accounts during the decedent's lifetime. *In re Estate of Cullman*, 169 Mich App 778, 785-786; 426 NW2d 811 (1988).

The remainder of the conversion issue focuses on plaintiff's contention that the decedent never intended defendant to receive the remainder of the Knights of Columbus accounts as the surviving joint owner. Plaintiff asserts defendant was placed as the joint owner on the accounts merely as a convenience to assist the decedent in bill payment and that the decedent intended the accounts to be distributed equally upon her death to all beneficiaries, in accordance with the residuary clause of her will.

Our resolution of the issue regarding silent fraud does not impact our determination regarding conversion. The issue of silent fraud pertained specifically to the decedent's will and not the inducement of the decedent to provide for defendant as a joint owner on the disputed accounts. Hence, because the joint accounts passed outside the decedent's estate, the decedent's expression in her will regarding the intent to divide her estate equally is not relevant. As such, our determination regarding conversion is limited to testimony and documentation solely relating to these accounts.

Michigan's joint ownership statute pertaining to bank accounts provides that deposits made in a jointly held bank account, with rights of survivorship, "in the absence of fraud or undue influence, is prima facie evidence of the depositor's intention to vest title to the deposit in a surviving joint owner." *In re Cullman Estate, supra* at p 786, citing MCL 487.703. MCL 487.703 provides, in relevant part:

The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

Notably, this presumption may be rebutted "by reasonably clear and persuasive proof to the contrary, i.e., by proof of the decedent's intent that title to the jointly held funds not vest in the survivor." *In re Cullman Estate, supra* at 786.

In the present case, plaintiff provided testimony by the decedent's beneficiary, Patricia Marchese that the decedent had verbally indicated to her in November 2002, that she intended the accounts to be distributed equally among all of her beneficiaries. Defendant objected to the admissibility of this testimony as hearsay based on the absence of any documentary support or

other indicia of reliability. However, in accordance with MRE 803(3), hearsay may be admissible if it concerns the declarant's "then existing state of mind." The application of this rule has been clarified through case law to mean "that statements made by a decedent regarding the decedent's state of mind when depositing money into a joint bank account are not admissible into evidence if the statements were made after the joint bank account deposit was made." *In re Cullman Estate*, *supra* at 788, citing *Pence v Wessels*, 320 Mich 195, 204; 30 NW2d 834 (1948). The decedent signed the most current bank signature card providing for joint ownership and survivorship rights for defendant on December 6, 2002. The alleged statement by the decedent to another beneficiary regarding her intention that these monies be distributed equally amongst all beneficiaries occurred in November 2002. As such, "[i]t was proper to show the decedent's intentions and arrangements prior to [her] making the joint bank accounts, to rebut the presumption of joint ownership between the deceased and the defendant." *In re Cullman Estate*, *supra* at 789. A jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The jury and trial court are accorded substantial deference because both are in a better position to determine credibility and weigh the testimony. *Id.* This Court may overturn a jury verdict only when it is manifestly against the clear weight of the evidence. *Id.* Because evidence existed to rebut the presumption of survivorship, we will not overturn the jury's determination on the issue of conversion.

Of concern is the failure of both the trial court and attorneys to distinguish between the Knights of Columbus accounts and the two annuities at issue in this matter. The Knights of Columbus accounts involved credit union accounts designating defendant as a joint owner with rights of survivorship, while the annuities made defendant the primary beneficiary. Although the most recent designation on the credit union accounts was executed in early December 2002, the beneficiary designations for the annuities were made in 1990 and 1992 for the Sun Life Financial or Keystone annuity and the Ford Life or Sun America Life annuity, respectively. There exists little to no testimony or proofs in the lower court record on the annuities and they appear to have been treated as undifferentiated from the credit union accounts. This is problematic.

We would first observe, being contractual in nature, the annuities would not pass through the probate estate. With our elimination of the silent fraud claim, in conjunction with the jury's determination that the decedent was not operating under diminished mental capacity or the existence of undue influence, there exists no basis for the inclusion of these assets in the award to plaintiff. We would note that testimony regarding the decedent's purported intent to distribute her assets equally amongst all beneficiaries is very general and occurred in November 2002, almost ten years after the beneficiary designations were effectuated. Therefore, consistent with our reasoning in regard to plaintiff's claim of conversion and pursuant to this Court's prior rulings, we would assert:

To the extent that this testimony purported to disclose statements allegedly made by the deceased not in the presence of the defendant, after [the beneficiary designations] were made, and decedent's statements made at that time referring to [her] will and [her] intentions in disposing of [her] property thereunder, the testimony of this witness was not admissible to show [her] intentions with reference to the [beneficiary designations] at the time they were made." [*In re Cullman*, *supra* at 788-789.]

Based on both the lack and inadmissibility of evidence regarding the annuities, there exists no legal basis to disturb or negate the decedent's beneficiary designations on these accounts.

Defendant next argues that there was insufficient evidence to allow the jury to determine that defendant had a fiduciary relationship with the decedent and that she breached the fiduciary duties owed to the decedent. A confidential or fiduciary relationship is founded on trust or confidence reposed by one person resulting from the superiority and influence of another. *In re Estate of Wood*, 374 Mich 278, 282-283; 132 NW2d 35 (1965), overruled on other grounds in *Widmayer v Leonard*, 422 Mich 280, 288-289; 373 NW2d 538 (1985). The relationship embraces both typical fiduciary relations and informal relations that arise whenever an individual trusts in and relies on another. *In re Estate of Wood, supra* at 282-283. The relationship and the duties involved are not limited to those imposed by law but may be moral, social, domestic, or merely personal. *Id.*

Testimony demonstrated that the decedent never handled any financial affairs before her husband's death. After her husband's death, the decedent entrusted defendant with the authority to prepare checks for her signature and to assist in the management of the decedent's finances. Further, testimony demonstrated that defendant took funds from the accounts during the decedent's lifetime without permission and evidence existed rebutting the presumption of defendant's right of survivorship on the accounts. "Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (citation omitted). Defendant's actions on behalf of a financially unsophisticated individual, coupled with the decedent's trust and reliance on defendant to manage her finances, provided sufficient evidence to permit the jury to determine the existence of a fiduciary relationship and defendant's breach of those duties. As a result, the probate court properly denied defendant's motion for a directed verdict on this issue.

Defendant next raises several arguments regarding the special jury verdict form. After the close of proofs at trial, the parties discussed the special verdict form at great length. Consistent with our determination that the trial court improperly submitted the issue of silent fraud to the jury, we concur with defendant that the inclusion of an instruction on this issue was in error.<sup>3</sup> In addition, because the trial court should have first determined, as a question of law, the existence of a fiduciary duty owed by defendant to the decedent, *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004), submission of this instruction was also error, but is harmless based on the factual basis supporting the jury's decision.

Defendant next contends the trial court erred in submitting an instruction to the jury on conversion without a corollary instruction that, if the jury determined defendant to be a joint owner and survivor on the accounts, conversion could not occur. Based on our determination

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<sup>3</sup> We would acknowledge that defendant requested a special jury instruction on the issue of silent fraud. However, this instruction was merely an effort by defendant's counsel at damage control due to the trial court's ruling on the motion for directed verdict, and does not constitute a waiver.

that the jury could use the proffered testimony to rebut the presumption of survivorship, we need not address defendant's argument.

#### **IV. Remittitur**

Defendant next argues that the jury's verdict of \$236,000 was excessive and that the trial court erred in failing to grant a judgment notwithstanding the verdict (JNOV), an order of remittitur, or a new trial. A trial court's decision for a JNOV is reviewed de novo. *Sniecinski, supra* at 131. A decision on a JNOV motion requires a review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1998). A trial court's decision on a motion for a new trial or remittitur is reviewed for an abuse of discretion. *Diamond v Witherspoon*, 265 Mich App 673, 692; 696 NW2d 770 (2005). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

When reviewing a verdict in regard to remittitur, the verdict should be reviewed in a light most favorable to the plaintiff. *Palenkas v Beaumont Hosp*, 432 Mich 527, 556; 443 NW2d 354 (1988). However, remittitur is justified when a jury verdict exceeds the highest amount supported by the evidence. MCR 2.611(E)(1). Based on our determination of error in awarding plaintiff the proceeds of the two annuity accounts, remittitur is required and we remand this matter to the trial court for recalculation of the judgment.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto